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No. 83-1754

In the Supreme Court of the United States

October Term, 1983

PAULETTE THOMPSON MASSEY,
Petitioner,

vs.

EMERGENCY ASSISTANCE, INC.,
and

CITY OF KANSAS CITY, MISSOURI, a municipal
corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

**RESPONDENT EMERGENCY ASSISTANCE, INC.'S
BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there was a sufficient nexus between the City of Kansas City, Missouri, and Petitioner's employer-in-fact, Emergency Assistance, Inc., which would constitute Emergency Assistance, Inc. and the City of Kansas City, Missouri as Petitioner's employer, cognizable under Sec. 704a, Title VII, 42 U.S.C. Sec. 2000e, pursuant to either the single employer theory or the joint employer theory?
2. Does the term or phrase "any agent of such a person" as used in 42 U.S.C. Section 2000e(b) include independent contractors? In other words, has the statute modified the common law concept of agency to include independent contractors as agents?
3. Did the trial court clearly err in finding that Emergency Assistance, Inc. was not the agent of Kansas City?
4. Did the District Court and the Court of Appeals clearly err by applying the test of *Baker v. Stuart Broadcasting Company*, 560 F.2d 389 (8th Cir. 1977) and by subsequently finding that Emergency Assistance, Inc. and Kansas City should not be found to be Petitioner's employer pursuant to 42 U.S.C. Section 2000e(b) under either the single employer theory or the joint employer theory?
5. Did the trial court clearly err in sustaining the City of Kansas City, Missouri's Motion for Directed Verdict against Petitioner's claim for sex discrimination asserted under 42 U.S.C. Section 1983?

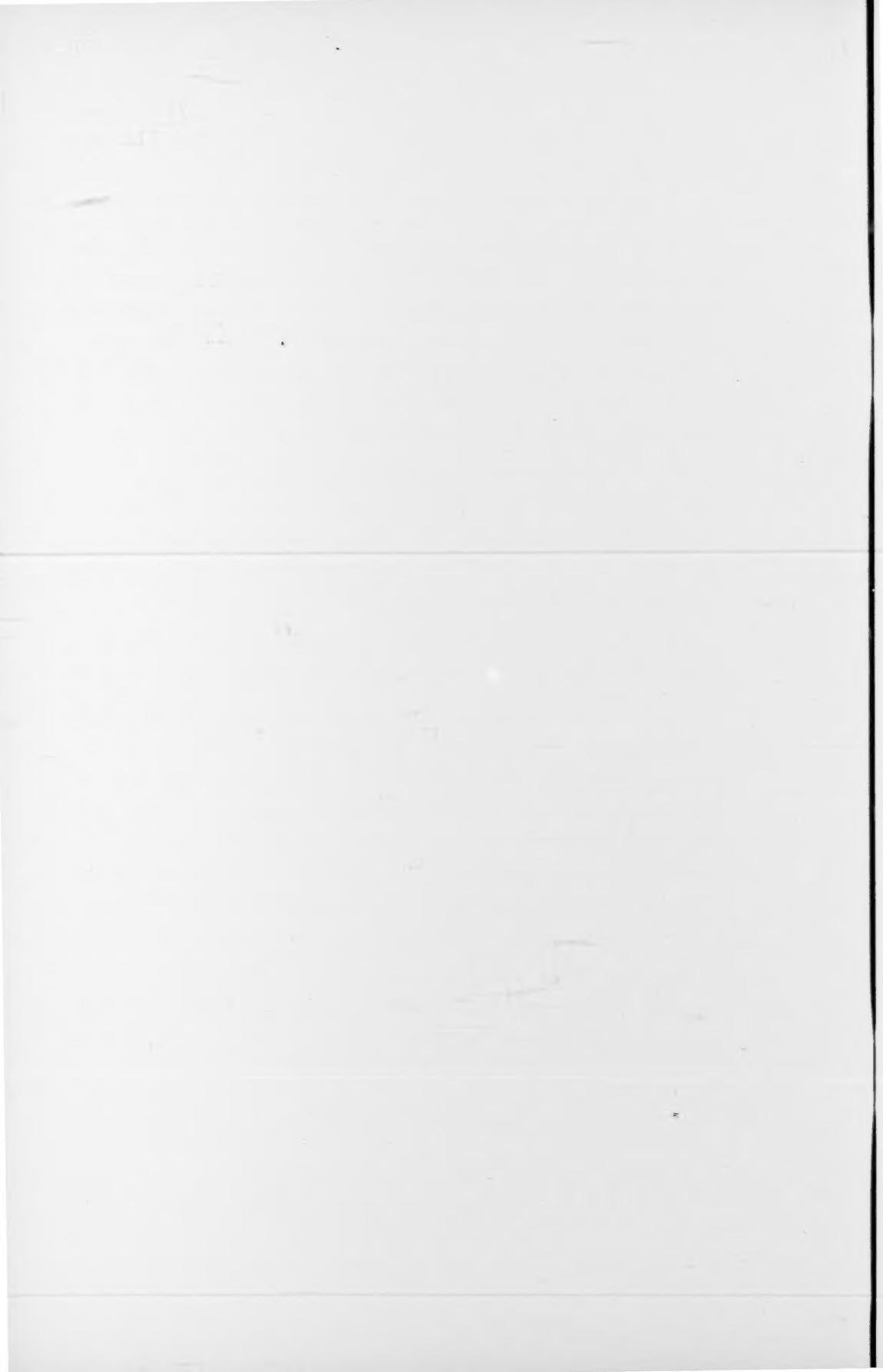


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REFERENCE TO REPORTS OF OPINIONS

The opinion of the Court of Appeals is reported at 724 F.2d 690 and the opinion of the Trial Court is reported at 580 F. Supp. 937.

JURISDICTION OF THIS COURT

Jurisdiction of this court to review the judgment of the Court of Appeals is pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Petitioner would have the Court believe that there is a Fourteenth Amendment issue in this case. The Trial Court heard no evidence supporting such and so this Respondent will not speculate further.

Obviously, interpretation of 42 U.S.C. Section 2000e(b) as to the meaning of "employer" and "any agent of such a person" is at issue in this case, but this case raises no other issues under the Statutes or Constitution of the United States.

STATEMENT OF THE CASE

This is a civil rights action brought pursuant to Title VII of the 1964 Civil Rights Act (42 U.S.C. 2000, et seq.) and Section 1 of the Ku Klux Klan Act of 1871 (42 U.S.C. Section 1983). The matter was tried to a jury on the Section 1983 allegations and to the Court on the Title VII allegations. At the close of Petitioner's evidence the Court directed a verdict on behalf of respondent, City of Kansas City, Missouri with respect to the Section 1983 claim and Petitioner voluntarily dismissed, with prejudice, her Section 1983 claim against respondent, Emergency Assistance, Inc.

Respondent is constrained to restate the case and facts since petitioner's presentation is riddled with inaccuracies and statements that are unsupported by the record.

In November, 1971, the City of Kansas City, Missouri, received funds from the U. S. Department of Housing and Urban Development (HUD) pursuant to Title I of the Demonstration Cities and Metropolitan Development Act

of 1966, for what is commonly known as the Model Cities program. Emergency Assistance, Inc. was created in or about 1971 for the purpose of providing emergency monetary assistance to the poor utilizing Model Cities program funds, made available under a contractual arrangement by the City of Kansas City, Missouri. The City and Emergency Assistance entered into contracts whereby the City provided Model Cities funds to Emergency Assistance to operate an emergency assistance program for the poor in Model Cities program areas for the years 1971-1975.

In operation, Emergency Assistance staff personnel would interview and screen applicants for assistance, make a determination as to their eligibility and needs, and distribute funds to them or to creditors on their behalf. Reimbursement for expenses (both administrative and distributional) would then be made to Emergency Assistance by the City.

The persons employed by Emergency Assistance, of whom plaintiff was one, were involved on a daily basis in interviewing applicants, investigating their needs, making decisions as to their eligibility and requirements, preparing documentation with respect to the same, and distributing funds. These activities, which comprised the whole function of Emergency Assistance, were carried on entirely by Emergency Assistance personnel. Emergency Assistance maintained its own bank account, drew checks for its necessary expenditures thereon, which were signed by Emergency Assistance personnel, and maintained its own offices (which were not associated with any City offices). Pursuant to its contract, Emergency Assistance was to file with the City, on a monthly basis, a report concerning its activities.

From time to time City personnel provided certain technical aid to Emergency Assistance in explaining the

HUD guidelines; and at the outset of the program, and occasionally thereafter, gave training to Emergency Assistance employees in how to interview applicants and evaluate their requests.

The governing body of Emergency Assistance was its Board of Directors, all private citizens except for one City employee who sat as an "ex-officio," non-voting member of the board. None of the Emergency Assistance directors were City Council members. Emergency Assistance personnel answered to the Emergency Assistance staff, who in turn were responsible to its Executive Director, who in turn was responsible to the Emergency Assistance Board of Directors. The board was fully autonomous.

The Mayor of Kansas City designated the persons who would make up the Board of Directors of Emergency Assistance. However, this was largely an exercise in formality, since recommendations for board positions were made by the residents of the areas to be served, and since the Mayor was chosen to exercise this function simply by virtue of his titular position rather than in the performance of any City duties, as such.

Pursuant to its contract with the City, Emergency Assistance was required to observe certain HUD sponsored guidelines in respect of its employee relations. Those guidelines, as paraphrased and synthesized, required the following of Emergency Assistance: that it submit a job description for each employment position detailing the duties, minimum qualifications and salary range therefor; that it register any employment vacancies with the CDA (an agency of the City), advertise and interview simultaneously with the CDA for those positions so that the CDA could maintain a "job bank" list of all potential employees for all Model Cities programs, and request referrals

of qualified applicants from the CDA's "job bank"; that it obtain approval from the CDA, based upon justification, for hiring an employee who was not a model neighborhood resident; that it submit a monthly report to the CDA on employee status, including salary changes; that it submit a monthly report to the CDA on job applicants who were referred to it; that it adopt a plan of salary and wage administration; that it prohibit an employee from occupying a conflicting job position; that it provide a specified amount of "release time" for employees who were pursuing "career development training" and provide for pay increases for those who successfully completed such training; that it establish "a suitable procedure for handling disciplinary actions and grievances"; that it notify the CDA of any suspension or termination of personnel; that it provide a right of appeal to the "Model Cities Board of Appeal and Review" in connection with employee disputes; and that it permit the CDA to attempt conciliation with respect to any employee dispute.

As noted, all of the rights of the employees and obligations of the corporation where contractual in nature rather than something mandated by a statute or City ordinance.

Petitioner, Paulette Thompson Massey, a Black female, commenced her employment as Administrative Officer with Emergency Assistance on April 17, 1972. She applied for the position at the physical location of the personnel department of the City of Kansas City, Missouri, as did a few other applicants near the corporation's inception. The CDA in its administration of the Model Cities program, allowed use of its space as a matter of convenience for Model Cities agencies until such time as Model Cities agencies could acquire their own offices.

Petitioner was terminated in August, 1974. She subsequently filed a complaint with the Equal Employment Opportunity Commission (EEOC) on August 30, 1974. Following a hearing before the Model Cities Board of Appeal and Review, and pursuant to a settlement and compromise agreement, Petitioner was reinstated with back pay.

Emergency Assistance, Inc. advertised for applicants for the position of Director in December, 1974. Petitioner submitted her application in response to the advertisement but was rejected by the Board of Directors.

Following her rejection for the position, Petitioner questioned James Jackson, one of two males on the nine person Board of Directors of Emergency Assistance and Chairman of the personnel committee, as to why she was not selected for the position. Following an unrecorded exchange with Mr. Jackson, Petitioner has interpreted Mr. Jackson's comments as having been ". . . that the Board would not consider a female for the position because a female could not handle the job". At Trial, Mr. Jackson testified that this comment was made in jest, was his own and not the Board's and that his ultimate decision in selecting a new director was based on his evaluation of qualifications and not upon the sex of the candidates.

Subsequently, a male was hired for the position. Petitioner was subsequently terminated. She filed another complaint with EEOC on June 24, 1975, charging discrimination on the basis of her sex for denying her a promotion to the position of Director. She amended the complaint to include the City of Kansas City, Missouri, on December 1, 1975. On December 3, 1979, EEOC rendered and issued its determination of reasonable cause to believe the allegations of petitioner's complaint. EEOC issued its letter of right to sue on June 3, 1980.

The District Court sustained Respondent Kansas City, Missouri's Motion for Directed Verdict on the Section 1983 claim at the close of Petitioner's evidence and the petitioner voluntarily dismissed, with prejudice, her Section 1983 claim as to Respondent, Emergency Assistance, Inc. The Court dismissed the Title VI claim against both Respondents for lack of subject matter jurisdiction finding Respondents were not employers within the meaning of Title VII. The Eighth Circuit Court of Appeals upheld the District Court's decision.

REASONS FOR GRANTING (OR REFUSING) THE WRIT

1. The Decision Below Does Not Conflict With the Decisions of Other Courts of Appeals in the Cri- teria Used to Determine Whether a Person Who Is Not the Employer-in-Fact Is an "Employer" Within the Meaning of Title VII.

Title VII, 42 U.S.C. Section 2000e(b) defines employer as: "A person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in a current or preceding calendar year and any agent of such a person."

The Petitioner charges that her employer-in-fact, Emergency Assistance, Inc., which never had fifteen or more employees and thus would not be subject to the jurisdictional requirements of Title VII, was the agent of the City of Kansas City, Missouri, a political subdivision, and therefore the principal's employees should be counted along with Emergency Assistance, Inc.'s employees, to meet the jurisdictional requirements under Title VII. In spite of Petitioner's argument, Courts of Appeals need the flexi-

bility to be able to utilize difference standards to determine whether a person is an "employer" due to its relationship with the employer-in-fact, which has less than fifteen employees.

In reaching its decision that the City of Kansas City, Missouri, was not an employer in the present case, the District Court applied the "single employer" test adopted by the Eighth Circuit Court of Appeals in *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir. 1977). The four pronged test considers: (1) interrelation of operations between the two entities; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. Petitioner contends that application of said test by the District Court was error.

According to Schlei & Grossman, the authority cited by Petitioner, different theories, though overlapping, may be used to determine whether an entity which is not the employer-in-fact, but rather has a relationship with such employer-in-fact, is an employer within the meaning of Title VII: (1) The Single Employer Theory; (2) the Joint Employer Theory; (3) the Agent Theory; and (4) Special Application of Integrated Enterprise Theory to Employer Associations. B. Schlei & P. Grossman, *Employment Discrimination Law* (2nd Ed. 1983) at 1000.

The Single Employer Theory allows ". . . separate entities" to be ". . . treated as a single employer for purposes of counting and liability . . ." *Id.* The factors considered to determine whether separate entities may be treated as one are those applied in *Baker*. Schlei & Grossman at 1000.

The Joint Employer Theory is applied ". . . to obtain jurisdiction over a company which is unrelated to the employer-in-fact but exercises sufficient day-to-day control

over (an employee-in-fact of another company) . . . so as to become a co-employer . . ." *Id.* at 1001. The following are considered in determining whether the two companies are joint employers: control of hiring, discipline or discharge of employees of the employer-in-fact; control of the work schedules and work assignments; or an obligation to train or pay such employees. *Id.* However, Schlei & Grossman note that no court has passed on the joint employer status absent a finding that the smaller company was the agent of the larger company. *Id.*

The Agent Theory. Title VII defines employer to include agent of employers. 42 U.S.C. Section 2000e(b). Since a statutory definition of agent has not been enacted the common law definition is applied.

Special Application of Integrated-Enterprise Theory to Employer Associations. A special application of the integrated enterprise theory is made in instances where employer associations have less than 15 employees but own and operate a central hiring hall and control all labor relations policies. *Id.*

The fact that one of the entities sought to be charged as an "employer" is a political subdivision should make no difference as the test of *Baker* can still be applied. Apparently, Petitioner fails to understand the reasoning in the cases cited in Petitioner's Brief as support of her position; however, a thorough reading of the cases will indicate that the decisions of the Court of Appeals do not conflict and thus allow *Baker* to be applied in matters such as the instant case.

Some courts have actually applied the agency theory in cases where one of the jointly charged employers was a political subdivision. In *Curran v. Portland Superintending School Comm.*, 435 F. Supp. 1063, 1073 (D.Me. 1977),

the District Court determined that though the city was not the plaintiff's employer, the city was sufficiently involved in the employment process (it appropriated funds for salaries) that it must be considered an employer along with the school district.

A reading of its opinion does not indicate whether the court felt it necessary to apply specifically the single employer theory or the joint employer theory to make its determination; but rather, due to the nature of the organization of the city and the school board and their relationship dealing with the allocation of funds for salaries and budgetary control of salaries, the court made its determination that the city was an employer by virtue of their agency relationship. The fact of budgetary or financial control is an appropriate component of agency, especially as in *Curran*, where the funds allocated by the City determined the expenses of the school system as it related to salaries. The case is distinguishable from *Oaks v. City of Fairhope*, Ala., 515 F. Supp. 1004 (S.D.Ala. 1981) wherein the Court determined that though the city allocated funds to the library there was no indicia of control exercised over the library board or its employees as ". . . under Alabama law the Library Board has full power and authority to control the expenditure of all funds received by the Library or appropriated to the Library." *Id.* at 1016.

Oaks specifically cites *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), wherein the court rejected the argument that a different test should be applied to a governmental employer as opposed to a private employer, stating:

The relevant legislative history of the 1972 amendments extending Title VII to the States as employers does not, however, support such a result. Instead,

Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. *Id.* at 1036.

In *Rogero v. Noone*, 704 F.2d 518 (11th Cir. 1983), plaintiff sued the county tax collector for unlawful discharge in violation of Title VII and 42 U.S.C. Section 1983, but failed to name the county as a party defendant, contending the tax collector was the agent of the county and therefore there was no need to actually name the county in the suit. *Id.* at 520. The tax collector had less than the required number of employees. Plaintiff urged the court to count all county employees to meet the jurisdiction requirement. *Id.* at 519. However, the Court granted defendant's motion for summary judgment holding that the tax collector was not employer within the meaning of Title VII since the county was not a party defendant and could not be counted for jurisdictional purposes. *Id.*

In *Rogero*, common law principles of agency were applied to determine whether the tax collector was an agent of the county as that was the only theory available to the Court to "liberally" classify the collector as an employer. There was no need for the application of the single employer theory or the joint employer theory to determine whether the collector and the county should be consolidated for jurisdictional purposes as the county "... was not made a party to this action and that is the omission critical to our decision". *Id.* at 520.

The court in the case of *Vanguard Justice Society, Inc. v. Hughes*, 471 F. Supp. 670, 696 (D.Md. 1979), said, "... (I)t is generally recognized that the term employer as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether

that party may technically be described as an "employer" of an aggrieved individual as that term has generally been defined at common law." 471 F. Supp. at 696 [11, 12].

The cases cited by Petitioner give ample reason for the need of the Courts to have ample flexibility in tests to apply to determine whether a related entity is an employer pursuant to Title VII. Since the term is to be given liberal construction, the Courts normally apply all theories, or aspects of all tests, in an attempt to find the related parties as an "employer". See *Quijano v. Univ. Fed. Credit Union*, 617 F.2d 129 (5th Cir. 1980).

The test of *Baker* can be applied in all employment situations, whether or not a political subdivision is a party, as the District Court so applied the four factors of the test at trial below. *Massey v. Emergency Assistance, Inc., et al.*, 580 F. Supp. 937 (1983). There may not be, although there can exist, the idea of common ownership. However, that is only one approach to the test. The other approach is financial control.

It appears that the Courts are mainly concerned with indicia of control that the larger entity exhibits over the smaller and not the status of the entity as a private business or a political subdivision. See *Barlow v. Avco Corporation, et al.*, 527 F. Supp. 269 (1981); *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973). A political subdivision can control a business entity in the same way that another business entity can control it. The fact that the Court in *Dumas v. Town of Mt. Vernon, Ala.*, 612 F.2d 974 (5th Cir. 1980), refused (in dicta) to apply the *Baker* test to consolidate the town, county personnel board and the town's officials for jurisdictional purposes is not on point with the instant case. The individuals named as defendants could not be counted twice (for Title VII pur-

poses and for 42 U.S.C. Section 1981, 1983, 1985(3) and 1986 purposes) and a thorough reading of the opinion makes it clear that the county personnel board had autonomy apart from the political subdivisions which allowed said county personnel board to administer their civil service systems under some set of civil service rules.

Finally, the cases of *Owens v. Rush*, 636 F.2d 283 (10th Cir. 1980), *Ayres v. International Brotherhood of Electrical Workers*, 666 F.2d 441 (9th Cir. 1982), *Trevino v. Celanese Corporation*, 701 F.2d 397 (5th Cir. 1983) and *Spirit v. Teachers Insurance and Annuity Association*, 691 F.2d 1054 (2nd Cir. 1982) are not in point and irrelevant to any issue raised in the instant case.

2. The Decision Below Does Not Raise Any Significant Problem Concerning the Choice of a Theory Courts Apply to Determine Whether an Entity Is an Employer Within the Meaning of Title VII.

Several theories may be applied to determine whether an employer who is not the employer-in-fact should be consolidated with a smaller employer to meet the 15 employees requirement of Title VII. But because of the different kinds of employers covered by the Act (individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations and legal representatives) no single standard should be applied to all employers. There is no need to designate a single standard or theory to be applied when facing the issue of consolidation depending on the type employer involved, as the Courts need flexibility to deal with different employers with different legal status and changing circumstances.

3. Whether the Test Applied in Determining the Relationship Between Two Private Entities As an Employer Is Applicable When a Government Subdivision Is an Alleged Employer.

The test applied in *Baker*, supra, would and should be applicable to the factual situation here concerning governmental agencies, as the same test can be applied. See *Massey v. Emergency Assistance, Inc.*, 580 F. Supp. 937 (1983); *Massey v. Emergency Assistance, Inc.*, 724 F.2d 690 (1984).

4. The Trial Court Did Not Err in Sustaining the City's Motion for Directed Verdict Against Petitioner's Claim of Sex Discrimination Asserted Under 42 U.S.C. Section 1983.

The Trial Court sustained the City's Motion for a directed verdict because it heard no evidence of any action by any officer, agent or employee of, or official action on the part of City itself, to be causally related to the matters of which Plaintiff complains. In so ruling, the Court relied upon *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

It was incumbent upon Petitioner to prove that Emergency Assistance, Inc. was the agent of the City of Kansas City, Missouri. Failure to so do, as herein, is fatal. Petitioner voluntarily dismissed her 1983 claim against Respondent Emergency Assistance, Inc. so Respondent shall not speculate further.

CONCLUSION

The Writ of Certiorari should not issue as the Petitioner has failed to document any diversity of opinion between the Circuits with regard to the issues of this case and the Petitioner has failed to demonstrate any clear error in the courts below.

Respectfully submitted,

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